NO. 6166

United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT

J. M. DUNGAN AND EUNICE DUNGAN, His Wife,
Appellants

vs.

POTLATCH LUMBER COMPANY, a Corporation,
Appellee.

BRIEF OF APPELLEE

Upon Appeal from the United States District Court for the Eastern District of Washington, Northern Division

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STATEMENT OF THE CASE

Appellee makes this statement of the case for the reason that in the judgment of its attorneys the statement contained in appellants' brief is incomplete and does not properly present the facts upon which the decision was based by the court below.

This action involves the construction of a contract between appellants and appellee for the sale of lumber, and particularly a provision in the contract limiting the amount of an inferior grade of lumber to 25 per cent of the total amount of lumber to be manufactured and delivered thereunder. (Rec. p. 7)

The contract (Rec. p. 4-15) recites that appellants are the owners in fee simple, free from all incumbrance and entitled to sell all of the merchantable White Pine timber, logs and lumber upon certain lands and premises in Latah County, State of Idaho, therein described (Rec. p. 5); that appellants are negotiating for the acquisition of other tracts of timber in Latah County, Idaho, particularly set forth, (Rec. p. 5) and that appellants may, in the near future, acquire an additional tract of timber and other White Pine timber and timber land contiguous or adjacent thereto and within the same logging chance or operation. (Rec. p. 6)

The agreement between Appellants and appellee as set forth in the contract, is that appellants shall sell, cut, manufacture, haul and deliver to appellee, loaded upon its trucks in its mill yard at Elk River, Idaho, all the White Pine timber standing upon the lands described, now owned by appellants or which they may acquire during the life of the contract, which will cut to Grade No. 3 Common or better, rough Idaho White Pine lumber; provided, that Grade No. 3 Common shall not exceed twenty-five percent (25 per cent) of the total cut and delivery, (Rec. p. 6-7-); and that appellee shall purchase such lumber from appellants for the price and upon the terms set forth in the contract. (Rec. p. 7)

The contract expressly provides that each and all of its terms and conditions shall apply to and cover all of said lands and the White Pine timber thereon which may be purchased by appellants during the life of the contract, as

fully as to the lands and timber thereon then owned by appellants. (Rec. p. 7)

The amount of the White Pine lumber covered by the contract is estimated therein at Nine Million Feet (9,000,000) board measure, more or less, but it is agreed that in any event it covers all of the merchantable White White Pine lumber which will meet the specifications required for lumber and which can be cut and manufactured from all of the White Pine timber upon the lands described in the recitals in the contract. (Rec. p. 7)

The total amount of lumber cut and delivered under the contract was Six Million Eight Hundred Fifty-seven Thousand Three Hundred Seven (6,857,307) feet. (Rec. p. 3, p. 24, p. 35)

Appellee paid for all of the lumber delivered at the contract price, except a balance of $15,308.31 which it refused to pay when it was discovered upon completion of the contract that appellants had delivered 780,851 feet of No. 3 Common lumber in excess of 25 per cent of the total amount of lumber delivered. (Rec. p. 45)

Appellants brought this action to recover the balance of $15,308.31, (Rec. p. 2-3-) alleging in their complaint that they had delivered to appellee under the contract, 6,857,307 feet of lumber and that the purchase price had been fully paid except a balance of $15,308.31. (Rec. p. 3)

Appellee answered the complaint, admitting the execution of the contract and the delivery of 6,857,307 feet of lumber cut from the timber designated therein, but

denying generally the other allegations of the complaint. (Rec. p. 21-22)

At the trial apellee by leave of Court filed amendments to the answer, Rec. p.41) admitting the deliveries of lumber and payments as alleged in the complaint. (Rec. p. 30)

Accompanying its answer appellee interposed a counter-claim for the recovery of $14,930.02 on account of the delivery by appellants' of 780,851 feet of Grade No. 3 Common lumber in excess of 25 per cent of the total amount of lumber delivered under the contract. (Rec. p. 22-26) A demurrer to the counter-claim was overruled but a motion to strike portions thereof was sustained as to paragraphs Two, Three and Five and denied as to Paragraph Four. (Rec, p. 28)

In paragraph Five of the counter-claim, which was stricken, appellee alleged that by the terms of said contract the appellants expressly warranted that the total amount of lumber cut and delivered thereunder would not contain more than 25 per cent of Grade No. 3 Common lumber and that at least 75 per cent of the total amount of lumber cut and delivered under said contract would be of a quality better than Grade No. 3 Common lumber. Rec. p. 23-24)

Appellants filed a reply to the counter-claim, denying the material allegations thereof, except as to the total amount of lumber delivered and as to the provisions of the contract. (Rec. p. 29)

During the trial of the case, before the Court sitting without a jury, it was admitted that of the total amount of 6,857,307 feet of lumber delivered, 2,299,971 feet was No. 3 Common; 4,557,336 feet was better grades; and that the excess of No. 3 Common over and above 25 per cent of the total cut and delivery was 780,851 feet. (Rec. p. 45-46) The reasonable value of the No. 3 Common lumber at the point of delivery was shown to be as follows:

In the year 1926	$15.50	
In the year 1927	14.50	
In the year 1988	13.50	(Rec. p. 48)

The Court decided that appellee was entitled to recover on its counter-claim (Rec. p. 50-53) and made special Findings of Fact (Rec. p. 34-37) and rendered judgment thereon allowing appellee the sum of $14,216.02 as a set off against the demand of appellants. (Rec. p. 38-39)

BRIEF OF THE ARGUMENT

1. Appellee did not agree to purchase the excess of Grade No. 3 Common lumber delivered by appellants and did not agree to pay for such excess at the contract price.

2. The subject matter of the contract was an undetermined quantity of timber and the amount of lumber which could be cut and delivered therefrom was indefinite and uncertain.

3. Appellee could not determine that the amount of Grade No. 3 Common lumber delivered would exceed 25 per cent of the total cut and delivered until the contract was fully computed and all the lumber delivered.

4. Appellee was obligated to accept all Grade No. 3 Common lumber delivered from time to time by appellants under the contract and could not reject any delivery because it contained more than 25 per cent of Grade No. 3 Common lumber.

5. The amount of Grade No. 3 Common lumber delivered by appellants was in excess of the amount stipulated in the contract, but having been accepted by appellee and the contract being silent as to the price of such lumber, appellee became obligated to pay the reasonable value of such excess at the time and place of delivery.

Inman v. L. E. White Lumber Company, 112 Pac. (Cal.) 560
R. Krasnow & Sons vs. Emerzian, 247 Pac. (Cal.) 536

6. Where a commodity is sold and no price is fixed, the law fixes a price at the reasonable or market value at the time of delivery.

Wilkins vs. Jackson, 227 Pac. (Okla.) 882
Burger vs. Ray, 239 S. W. (Tex.) 257
Bowser & Co. vs. Marks & Co., 131 S. W. (Ark.) 334, 32 L. R. A. (N. S.) 429
Williston on Sales, 2nd Ed., Sec. 167 Subdivision 4, Sec. 5681, Idaho Compiled Statutes (Uniform Sales Law)

7. As all lumber delivered and accepted was grade No. 3 Common or better, as specified in the contract, but more of Grade No. 3 Common was delivered than appellee

agreed to purchase, the question of warranty of quality is not involved in the case and notice of breach was unnecessary.

ARGUMENT

1. APPELLEE DID NOT AGREE TO PURCHASE EXCESS OF NO. 3 COMMON LUMBER DELIVERED.

This case involves a single clear cut issue, viz., what price should appellee be required to pay for a quantity of Grade No. 3 Common lumber amounting to 780,851 feet delivered by appellants in excess of the amount which appellee agreed to purchase under the contract?

Should appellee be required to pay the full contract price for an inferior grade of lumber which it did not agree to purchase but was required to accept during the performance of the contract and which, admittedly, was not worth fifty per cent of the contract price, or should it be permitted to pay the reasonable market value of such excess at the time and place of delivery?

The answer to this question should be found in a proper construction of the contract and the application of sound principles of law to the facts of the case, rather than by resort to legal fictions which tend to prevent instead of promote justice.

2. SUBJECT MATTER OF CONTRACT

At the time the contract was entered into, appellants owned certain timber which was particularly described in the contract. They were negotiating for the purchase of

other tracts of timber which are also particularly set forth in the contract. It was contemplated that they might acquire additional timber for which negotiations were not then even under way. All of the timber referred to constituted one compact body and one logging chance or operation, (Rec. p. 6) and appellants desired to sell and appellee to buy all the White Pine lumber which could be cut and manufactured from such timber or so much thereof as appellants should acquire during the life of the contract and which would cut to Grade No. 3 Common or better rough Idaho White Pine lumber but with the express agreement that the Grade No. 3 Common lumber should not exceed 25 per cent of the total cut and delivery. (Rec. p. 7)

The subject matter of the contract was an undetermined quantity of timber and an uncertain amount of lumber to be manufactured therefrom. If appellants acquired the timber for which they were negotiating, a greater quantity of lumber would be manufactured and delivered, and if they succeeded in getting the additional tract which they thought they might secure, the quantity of lumber to be delivered under the contract would be even greater. The parties to the contract did not know how much timber would be secured or how much lumber could be cut and delivered under the contract. All such lumber, however, that would cut to Grade No. 3 Common or better was covered by the contract, but the Grade No. 3 Common could not exceed 25 per cent of the total amount delivered.

3. AMOUNT OF GRADE NO. 3 COMMON UNDETERMINABLE UNTIL CONTRACT COMPLETED.

Since the total amount of lumber to be delivered was uncertain while the contract was in the course of performance, the amount of Grade No. 3 Common to be delivered was likewise uncertain. At no time during the performance could appellee determine that the Grade No. 3 Common lumber delivered would exceed 25 per cent of the total amount of lumber which would be manufactured and delivered. The trial Judge aptly stated in his opinion.

> "How can you determine what twenty-five percent of a volume of lumber is without knowing what that volume of lumber is, is beyond my comprehension. How you can determine that the Common under this contract exceeded twenty-five percent of the whole, without knowing what the whole was, is beyond my knowledge of mathematics. It seems to me that in the very nature of things and as inhering in the contract itself, it necessarily contemplates that the contract would have to be performed before anybody would know whether or not the amount of common lumber delivered under it, No. 3 delivered under it, was in excess of twenty-five per cent of the whole, and the contract contemplates the delivery by the plaintiff to the defendant of all the lumber cut upon the lands in question, and the contract does not provide in its terms what is the value of that No. 3 Common which is found to be in excess of twenty-five per cent, and the law applies."
> (Rec. p. 51)

4. APPELLEE COULD NOT REJECT ANY GRADE NO. 3 COMMON LUMBER DELIVERED DURING PERFORMANCE.

The parties agreed that "Grade No. 3 Common shall not exceed twenty-five per cent of the *total* cut and delivery."

The fact that the lumber delivered at any one time or during any one month or even durnig any one year comprised more than twenty-five per cent of Grade No. 3 Common would not permit appellee to reject it, or refuse to accept further deliveries of the same kind as the excess could be off-set during the further performance of the contract. One carload of lumber might contain forty per cent of No. 3 Common and the next carload might contain only ten per cent of the low grade lumber. The percentage of Grade No. 3 Common lumber delivered during one month or one year might be equalized during the succeeding month or the succeeding year. It was only when the total amount of lumber was delivered under the contract that appellee could say to appellants "You have delivered more Grade No. 3 Common lumber than you were entitled to deliver under the contract and more than we agreed to purchase." At any time prior to the completion of the contract appellants had the right to demand acceptance of all lumber grading No. 3 Common and better delivered by them and appellee could not refuse to accept it without subjecting itself to the penalty provided for in the contract for refusal to accept any lumber

delivered thereunder in accordance with its terms. (Rec. p. 14)

The provisions in the contract with reference to grading, inspection and rejection (Rec. p. 12-13) have no application to the amount of Grade No. 3 Common lumber delivered. The grader could only reject lumber which did not grade as good as No. 3 Common and determine the quantities of Grade No. 3 Common and better grades delivered.

5. APPELLEE LIABLE FOR THE REASONABLE VALUE OF THE EXCESS OF GRADE NO. 3 COMMON LUMBER DELIVERED.

When the contract was completed and all the lumber delivered it was determined that appellants had delivered an excess of 780,851 feet of Grade No. 3 Common lumber. They had delivered that amount in excess of twenty-five per cent of the total cut and delivery. What then was the obligation of appellee with respect to this excess? It had not agreed to purchase it, yet it had been compelled to accept it with the lumber which it had purchased. The contract was silent as to the price of Grade No. 3 Common lumber. It contained no provisions as to the value of this grade of lumber found to be in excess of twenty-five per cent of the total amount delivered. As far as the contract price of $32.50 is concerned, appellants had delivered this excess quantity of lumber which was not covered by the contract. What price should appellee be required to pay for it? Manifestly, its reasonable value at the time and place of delivery.

The situation is the same with respect to this excess of Grade No. 3 Common lumber as it was in the case of Inman v. L. E. White Lumber Company, *supra*, where it was held that a purchaser accepting and using a greater number of ties than he had purchased, assumed the obligation to pay for them. In that case the contract fixed the price of ties of the same grade as the excess delivered and the Court held that the contract price was controlling in the absence of all other evidence, stating in the opinion:

> "But if this were not so, plaintiffs could at least recover the reasonable value of the ties in question. No inquiry was made as to the reasonable value, but the contract itself is evidence of this and controlling in the absence of all other evidence."
>
> *Inman vs. L. E. White Lumber Company*, supra, P. 561

6. WHEN NO PRICE IS FIXED THE LAW FIXES THE PRICE AT REASONABLE VALUE.

> "The general rule is that, where a commodity is sold and no price fixed, the law fixes the price at the reasonable or market value at the time fo delivery."
>
> *Wilkins vs. Jackson*, supra, page 884
>
> "If, however, no agreement is come to in regard to the price, and, nevertheless, the buyer keeps the goods, the seller is not without remedy for the law, as is provided in the sub-division (4) of section 9 of the Sales Act, above quoted, would require the buyer to pay a reasonable price."
>
> *Williston on Sales*, supra

> "Where the price is not determined in accordance with the foregoing provisions, the buyer must pay a reasonable price. What is a reasonable price is a question of fact dependent on the circumstances of each particular case."
>
> Subdivision 4, Section 5681, Idaho Compiled Statutes.

The undisputed evidence in this case shows that the reasonable market price of the excess of Grade No. 3 Common lumber delivered was $15.50 in 1926, $14.50 in 1927, and $13.50 in 1928. (Rec. p. 48)

It was not worth fifty per cent of the contract price. The trial Court held that appellee should pay such reasonable value, stating in the opinion:

> "The legal conclusion, as it appears to me, is fortified by the fact that it comports with the equities and the common honesty of the transaction. The plaintiffs have no right to saddle upon the defendant a quantity of lumber at $32.50 which ,according to the market at the time, was not to exceed half that value, in the face of a provision in the contract which expressly provides that the No. 3 Common shall not exceed a quarter of the entire lumber sold and delivered. If the plaintiffs receive from the lumber that they sold and delivered every dollar that they are entitled to for the seventy-five per cen tof the lumber sold, at $32.50, and receive the market valne of the excess of the No. 3 Common additional, at the time and place it was received by the lumber company, they receive everything that in equity and good conscience they are entitled to, so the equities of the case are in conformity with what I consider to be the law of the case, and the judgement will be accordingly." (Rec. p. 52)

7. WARRANTY OF QUALITY AND NOTICE OF BREACH.

The decision in this case was not based on a warranty of quality. The case was tried and decided on the theory that a quantity of Grade No. 3 Common lumber was delivered in excess of the amount which appellee agreed to purchase at the contract price and that the contract price did not apply to such excess. The trial Court ordered stricken from the counter-claim paragraphs 2, 3 and 5, which set up the defense of breach of warranty of quality. (Rec. p. 27-28) In paragraph 5 of the counter-claim, which was stricken, appellee alleged:

> "That by the terms of said contract the plaintiffs expressly warranted that the total amount of lumber cut and delivered thereunder would not contain more than 25 per cent of Grade No. 3 Common lumber and that at least 75 per cent of the total amount of lumber cut and delivered under said contract would be of a quality better than Grade No. 3 Common lumber." (Rec. p. 23-24)

The allegations in paragraph 7 of the counter-claim with respect to notice of breach, related to the defense of breach of warranty and became unimportant in view of the construction of the contract adopted by the trial Court.

The law does not require notice except in cases where the buyer relies upon a breach of warranty after acceptance of the goods. Section 5721, Idaho Compiled Statutes.

In this case the question involved is not a breach of

warranty of quality of the lumber delivered, but the delivery of lumber which the appellee did not agree to purchase. All of the lumber delivered and accepted was of the quality specified in the contract. It was of Grade No. 3 Common lumber or better. The trouble arises from the fact that appellants delivered entirely too much of the Grade No. 3 Common lumber. They delivered more of the low grade than the appellee had agreed to buy. Appellee was compelled to accept the excess as deliveries were made, because it could not determine that the low grade lumber would constitute an excess until the completion of the contract. The trial Court held that appellee was required to pay the reasonable market price for the excess and not the contract price which was more than double its value. We believe that this holding is based on sound legal principles, as well as justice, and that the judgement should be affirmed.

Respectfully submitted,

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